No. 91-1978

In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
Petitioner,

v.

LARRY BUELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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14 pp

QUESTION PRESENTED

Did the Connecticut Supreme Court err in finding that a manifest necessity was not proven where, upon a review of the entire record, the sole reason for the declaration of a mistrial was fully disclosed to the trial prior to the attachment of jeopardy?

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ADDITIONAL FACTS RELEVANT TO THE STATEMENT OF THE CASE

In addition to the facts presented by the petitioner and those in the decision by the Connecticut Supreme Court, Pet.App.(dec.) at A1-17,[1] the respondent relies on the following:

The jury voir dire in this case began on March 5, 1990 and ended on March 7. Pet.App.(dec.) at A4; TA.6,201. The case was then continued for two weeks until March 21 when the jury was to be sworn and the evidence was due to begin. During the voir dire, the prosecutor announced its list of potential witnesses to two separate panels of veniremen. This was the first notice to the defendant of the state's potential witnesses. Pet.App.(dec.) at A4; TB.14-15. The name of Rose Mumford was not on either list.

The next relevant date was March 16. All of the relevant events of that day took place outside the courtroom. On that day, the prosecutor subpoenaed Ms. Rose Mumford to the state's

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[1] The following abbreviations are used for citations to the record and the petitioner's petition and appendix:

"Pet.Cert. at __"	--	refers to the pages of the petitioner's petition for a writ of certiorari.
"Pet.App.(dec.) at __"	-	refers to the pages of the appendix to the petitioner's petition for a writ of certiorari and specifically to the decision of the Connecticut Supreme Court which is reproduced there.
"TA.__"	--	refers to pages of the trial transcript for March 5 to 7, 1990.
"TB.__"	--	refers to pages of the trial transcript for March 21 to 23, 1990.
"TC.__"	__	refers to the pages of the trial transcript for April 18, 1990.

attorney's office and questioned her about the defendant's failure to appear in court. She learned that Mrs. Mumford, who was an older woman living with the defendant's mother, knew about the defendant's flight to Puerto Rico, witnessed his departure and later communicated with him by mail and a Western Union Monogram. TB.361. The prosecutor then served Mrs. Mumford with a subpoena requiring her to appear in court as a witness in this case.

The prosecutor did not notify the defense counsel that Rose Mumford would be called as a state's witness until they returned to court on March 21. However, the defense counsel heard of the March 16 meeting between the prosecutor and Rose Mumford before then. Mrs. Mumford herself spoke with attorney Williams and, during that conversation, became concerned that she may have admitted aiding the defendant in a crime thereby incriminating herself. Pet.App.(dec.) at A6-7; TB.372-73. Defense counsel, attorney Williams, recommended that she seek counsel. She asked that he represent her, and he agreed. TB.372-73.

On the day the parties returned to court, March 21, attorney Williams filed an appearance stating that he represented Rose Mumford and then moved to quash the subpoena the prosecutor served on her. Pet.App.(dec.) at A4-5; TB.2-3. In the argument, attorney Williams clearly stated to the court and the prosecutor that he represented Rose Mumford. Id.; Pet.App.(dec.) at A4-5 n.3. The prosecutor said she was surprised to hear that defense counsel represented "Rose Mumford, who is an independent

witness." Pet.App.(dec.) at A5 & n.4, A14; TB.5. There was no further comment on the Mumford situation, and the court denied the motion to quash. Pet.App.(dec.) at A5-6; TB.9. The prosecutor did not object to attorney Williams' representation of Rose Mumford, nor did she suggest that any action be taken. There was no mention of any potential effect of the representation on the state's presentation of evidence by either the prosecutor or the court. Although this matter was brought out before the jury was sworn, the prosecutor did not request or otherwise warn the court that this should be resolved before the attachment of jeopardy. Instead, the court proceeded to start the trial.

When the jury was called out and seated, the prosecutor announced to them for the first time that Rose Mumford would be called by the state as a witness. TB.12.

After this, the court had the jury sworn. Pet.App.(dec.) at A5-6, A14-15; TB.17. The prosecution then began presenting witnesses.

After two days of testimony from seven state's witnesses, the prosecutor addressed the court in the absence of the jury and moved to disqualify attorney Williams from representing Rose Mumford. Pet.App.(dec.) at A6. Williams objected and "argued that the court should hold a hearing, pursuant to State v. Williams, 203 Conn. 159, 523 A.2d 1284 (1987), and United States v. Curcio, 680 F.2d 881 (2d Cir. 1982), to determine whether the defendant and Mumford would make a knowing and intelligent waiver

of their right to conflict free representation. Pet.App.(dec.) at A7. Williams represented to the court that he had advised the defendant and Mumford of their rights and of the potential conflicts in dual representation, and that each was prepared to make such a waiver on the record." Pet.App.(dec.) at A7. The court declined to do this and declined to follow the requests of both counsel that the case not be terminated. The trial court declared a mistrial. Pet.App.(dec.) at A7. The basis of the mistrial was attorney Williams' representation of Rose Mumford, a fact that attorney Williams had disclosed to the same trial court before the jury was sworn and jeopardy had attached.

After the mistrial, the defendant moved to dismiss the case on the ground that a second prosecution would offend double jeopardy guarantees of the federal constitution. That motion was also denied. Pet.App.(dec.) at A8. On appeal, the Connecticut Supreme Court reversed and held that there was no manifest necessity for the declaration of a mistrial. The case was ordered to be dismissed. Pet.App.(dec.) at A16-17.

REASONS FOR DENYING THE PETITION

The only reason proffered by the petitioner for certification is its claim that the Connecticut Supreme Court "fashioned a mechanical rule that thwarts the public justice policy embodied in the manifest necessity standard." Pet.Cert. at 8-9. This appears to be a claim that the Connecticut Supreme Court created a new rule which conflicts with the decisions of this Court. A fair reading of the decision demonstrates that this is simply not so. The Connecticut Supreme Court did not establish a new, rigid rule but applied the existing one which, contrary to the petitioner's assertions, gives due deference to the trial court's judgment. Contrary to the petitioner's claim, this case presents nothing more than the application of specific facts to legal standards established by this Court. The petition should be denied because it does not present any special or important issues of law.

In its decision, the Connecticut Supreme Court set out the appropriate legal standard that applies in cases where a trial court has declared a mistrial over the objection of a criminal defendant. The court noted that the issue is one involving double jeopardy under the Fifth Amendment. Pet.App.(dec.) at A10-11. The defendant does not have a per se right to a dismissal after a mistrial. There are competing rights and policies to be considered. These include a defendant's "'"valued right to have his trial completed by a particular tribunal;"'" Pet.App.(dec.) at A10-11, quoting, Arizona v. Washington, 434

U.S. 497, 503 (1978); and the competing "'public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury'" Pet.App.(dec.) at A11, again quoting, Arizona v. Washington, supra, 505. All of these rights and policies were fully considered by the Connecticut Supreme Court in arriving at its decision.

The Connecticut Supreme Court also recognized that the standard by which these concerns are to be measured is the manifest necessity standard. "'In construing the double jeopardy clause of the United States constitution in the context of a declaration of a mistrial over a defendant's objection, the seminal decision is United States v. Perez, [22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824)].'" Pet.App.(dec.) at A11. The court then acknowledged and emphasized that the standard does not represent a mechanical rule, nor does it allow for a mechanical application.

> The United States Supreme Court has continued to adhere to the "manifest necessity" standard set forth in Perez, and has rejected "the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." Illinois v. Somerville, [410 U.S. 458,] 462 [93 S.Ct. 1066, 35 L.Ed.2d 425 (1973)]; see also United States v. Jorn, 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed.2d

543 (1971). We have similarly eschewed a mechanical application of the manifest necessity standard. State v. Van Sant, [198 Conn. 369,] 379 [, 503 A.2d 557 (1986)].

Pet.App.(dec.) at A13-14.

This acknowledgement of the legal standard is, of course, contrary to the petitioner's claim in this petition. The petitioner specifically complains that the Connecticut Supreme Court has fashioned and used a "mechanical rule", even though the court expressly pointed out in its decision that it was well aware that a "mechanical rule" was not to be used and that it rejected such a rule.

The court, moreover, undertook to follow this Court's precedents and reviewed this case under the flexible rule of "manifest necessity." In doing this, the court examined the entire record in the case. "'It is the examination of the propriety of the trial court's action against the backdrop of the record that leads to the determination whether, in the context of a particular case, the mistrial declaration was proper.'" Pet.App.(dec.) at A14; State v. Van Sant, 198 Conn. at 379.

The examination of the entire case led the court to the conclusion that the prosecution did not prove manifest necessity. The record showed that the trial court based the mistrial solely on the fact that attorney Williams represented both the defendant and Rose Mumford. There was no inquiry made of the defendant or Rose Mumford regarding their willingness to be represented by one

attorney. There was no inquiry of any substance into whether the state's case was affected by this. The only statement about the latter was the prosecutor's speculation, which was adopted by the trial court, that it had been deprived of Rose Mumford's testimony by attorney Williams' actions. This, however, begged the question of whether Rose Mumford would give any testimony at all, given that she had stated through attorney Williams that she intended to claim her privilege not to incriminate herself. The key fact about these matters is that it all of it was brought to the attention of the trial court and the prosecutor before the jury was sworn and nothing at all was done about it. There were no new facts brought out at mid-trial that were not disclosed and well known prior to the trial. The Connecticut Supreme Court therefore held that there was no manifest necessity.

> Here, the defendant's trial had proceeded for two days, through the testimony of five [sic, seven] witnesses, before the trial court declared a mistrial, yet the cause to which the court attributed the necessity for a mistrial had been disclosed to the court and the prosecutor before the jury was sworn.

Pet.App.(dec.) at A16.

The petitioner complains that the result in this case is simply based on timing and that this is unprecedented. Pet.Cert. at 12. The claim that it is merely a timing problem denigrates the Connecticut Supreme Court's decision which did not focus on

this until it had reviewed the entire case. That review of the entire record showed that all of the relevant information used as a basis of the declaration of the mistrial was before the court before jeopardy had attached. At that point, the matter should have been addressed by the trial court or prosecutor, if indeed it was a source of potential harm. As the Connecticut Supreme Court concluded, the issue of the dual representation of the defendant and Mumford could hardly be termed a manifest necessity since it contained no element of surprise to the court. The issue did not arise or become known to the court only after the jury was sworn, but arose and was known before the jury was sworn.

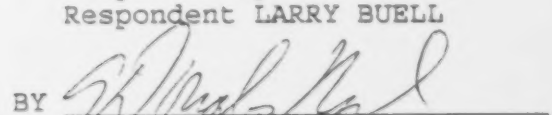
On the claim that the holding in this case is unprecedented, the petitioner fails to cite any case in which manifest necessity was found and upheld on appeal where the reason for the declaration of the mistrial was fully disclosed before the jury was sworn and jeopardy attached. See, Pet.Cert. at 8-13. The undersigned has not found any such case in his research. See, e.g., United States v. Perez, supra (jury unable to agree on verdict); United States v. Jorn, 400 U.S. 470 (1971) (court concerned during trial that witnesses may incriminate themselves and declared mistrial so they could consult with lawyers); Illinois v. Somerville, 410 U.S. 458 (1973) (court realized during trial that indictment was deficient and declared mistrial); Arizona v. Washington, 434 U.S. 497 (1978) (court found defense counsel's comment to jury inappropriate and

prejudicial to prosecution). It appears that the petitioner's claim--that a manifest necessity can occur even though the reason for the mistrial is disclosed before trial--is the finding that is unprecedented, not the Connecticut Supreme Court finding.

CONCLUSION

In reaching its decision, the Connecticut Supreme Court relied upon established legal principles that this Court has set out in its several cases on "manifest necessity." Pursuant to those standards, the Connecticut Supreme Court undertook a complete review of the record and decided the matter only after considering all aspects of the case. The court, moreover, considered all the appropriate policies and rights of the parties and the trial court in coming to its decision. It certainly did not ignore or compromise the public justice policy, as claimed by the petitioner. The petition for a writ of certiorari should be denied.

Respectfully submitted,
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